CHIENG SOH GEOK & ORS

v.

CHIENG SING HUAT

HIGH COURT SABAH & SARAWAK, SIBU
TEE AH SING J
[SUIT NO: 22-110 OF 1998]
17 SEPTEMBER 1999

SUCCESSION: *Distribution of estate - Entitlement to intestate's estate - Claim for declaration that plaintiffs and defendant entitled to equal shares of estate - Whether duty of administrator to distribute estate - Administration of Estates Ordinance (Cap. 80) (Sarawak), s. 17(c) - Whether proper for court to grant declaration as no administrator appointed*

The plaintiffs and defendant were the surviving children and the heirs and beneficiaries of the estate of one Chew Geok King who passed away intestate. The plaintiffs claimed that the defendant unreasonably and wrongfully wanted the estate's 1/2 undivided share in a shophouse to be transferred to him as the sole beneficiary of the estate to the exclusion of the plaintiffs who were also the rightful beneficiaries under the estate and entitled to share in the shophouse.

The defendant prayed for the writ of summons and statement of claim of the plaintiffs to be struck off on the grounds that it disclosed no reasonable cause of action and that it was an abuse of process of the court. Also, the plaintiffs' action was premature as no attempt had been made to apply to the Probate Officer for letters of administration. Further, the Sarawak Administration of Estates Ordinance (Cap. 80) (Sarawak) ('the Ordinance') did not confer any jurisdiction on the High Court to issue any grant of letters of administration or probate.

Held:

[1] The Ordinance does not confer any jurisdiction on the High Court to issue any grant of probate or letters of administration. The person clothed with the power to do so is only the Probate Officer.

[2] Neither the plaintiffs nor the defendant made any application to the Probate Officer for the grant of letters of administration in respect of the estate of the deceased. Under s. 17(c) of the Ordinance, it is the duty of the administrator to distribute the residue of the estate among the beneficiaries or heirs of the deceased according to the will of the deceased or as the case may be in the shares to which they are entitled by recognised law or custom.

[3] The claim by the plaintiffs was of no consequence since only the administrator could make the decision as to the person or persons entitled to the estate and such administrator was not appointed. Under s. 29 of the Ordinance, the administrator may refer the dispute in the claim to the court.

[4] It was not proper for the court to usurp the power of the administrator by granting a declaration that the plaintiffs and defendant were the rightful issues, heirs and beneficiaries of the estate of the deceased and were entitled to take in equal shares under the estate of the deceased in view of s. 17 of the Ordinance. If any of the issues, heirs or beneficiaries were dissatisfied with the decision of the administrator as to the person or persons entitled to the share of the estate and in what proportions, they could bring an action against the administrator.

[5] As no administrator was appointed, this action by the plaintiffs was premature. The statement of claim disclosed no reasonable cause of action.

[Writ of summons and statement of claim struck off with costs to defendant.]

Case(s) referred to:

Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Berhad [1993] 4 CLJ 7 ***(refd)***

Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor [1988] 2 MLJ 604 ***(refd)***

Goh Joon v. Kerajaan Negeri Johor & Ors [1999] 5 CLJ 335 ***(refd)***

Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor [1998] 3 CLJ 253 ***(refd)***

Lim Siok Luan v. Theresa Chin Kim Thye [1999] 1 AMR 133 ***(refd)***

Ong Ka Kim v. Wong Sing Kiong & Ors [1997] 4 CLJ Supp 440 ***(refd)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British American Life & General Insurance Bhd [1993] 3 CLJ 606 ***(refd)***

Sum Phoon Mun v. Mann Foong Realty Sdn Bhd & Anor [1998] 3 CLJ 919 ***(refd)***

Legislation referred to:

Administration of Estates Ordinance 1948 [Sarawak], ss. 17(c), 29

Specific Relief Act 1950, s. 41

Rules of the High Court 1980, O. 15 r. 16, O. 18 r. 19(1)(a)

For the plaintiffs - Stephen Chung; M/s Stephen Robert & Wong

For the defendant - Wong Sing Nang; M/s Wong, Orlando Chua & Co

Reported by Usha Thiagarajah

JUDGMENT

Tee Ah Sing J:

On 9 September 1998 Chieng Soh Geok ("the 1st plaintiff"), Chieng Soh Eng ("the 2nd plaintiff"), Chieng Soh Hua ("the 3rd plaintiff"), Chieng Soh Choo ("the 4th plaintiff"), Chieng Soh Hee ("the 5th plaintiff"), Chieng Soh Hie ("the 6th plaintiff"), Chieng Suk Mui ("the 7th plaintiff") and Chieng Sing Ming ("the 8th plaintiff") (hereinafter collectively referred to as "the plaintiffs") filed a civil suit against Chieng Sing Huat ("the defendant").

The relevant parts of the statement of claim reads as follows:

1. At all material times the Plaintiffs are and were the surviving eldest son and daughters, heirs and beneficiaries of the Estate of Chew Geok King (deceased) (hereinafter referred to as the "Deceased") who passed away intestate on the 31st May 1992.

2. The Defendant is and was at all material times the surviving younger son, heir and beneficiary of the Estate of the Deceased and the brother of the Plaintiffs.

3. At the time of death of the Deceased, the Plaintiffs and Defendant had attained the age of majority and entitled to take under the Estate.

4. At all material times the Deceased owned the following properties (hereinafter referred as "the Estate")

Particulars

(A) One-half (1/2) undivided right title share and interest in that parcel of land together with a Four (4) storey shophouse thereon known as No.72, Jalan Kampong Nyabor and appurtenances thereof and described as Lot 167 Block 5 Sibu Town District.

(B) Saving Account in several Bank as follows:

	A/C No.	Banks	Amount
(i)	No. 218237606	The Chartered Bank	RM140.45
(ii)	No. 22-082-12019-0	Hock Hua Finance Corporation Bhd. (formerly known as Hock Thai Finance Corporation Bhd.)	RM39,863.30

(iii)	No. 019-50-09580-3	Hong Leong Bank Berhad	RM8,767.43

(C) Fixed deposit in several Finance or Institutions as follows:

	A/C No.	Finance Institutions	Amount
(i)	No. 04-0904-010541-8	MBf Finance Bhd. (placement No. 16-0904-031752-5)	RM19,177.89 as from 26.6.1998
(ii)	002539/9	Delta Finance Bhd. (Receipt No. 271171)	RM9,003.87 as from 18.2.1998
(iii)	002539/9	Delta Finance Bhd. (Receipt No. 271172)	RM16,166.89 as from 3.3.1998
(iv)	002539/9	Delta Finance Bhd. (Receipt No.297143)	RM17,332.91 as from 27.6.1998
(v)	002539/9	Delta Finance Bhd. (Receipt No.297142)	RM19,239.37 as from 10.7.1998
(vi)	F/005/002861/1	Chew Geok Lin Finance Berhad (Cert. No. 980031)	RM9,527.24 as from 30.3.1998
(vii)	F/005/002861/1	Chew Geok Lin Finance Berhad (Cert. No. 980032)	RM24,102.60 as from 4.1.1998

5. Pursuant to the provisions of the Distribution Act (Revised) both the plaintiffs and defendant are entitled to equal shares under the Estate.

6. However, the Defendant unreasonably and wrongfully wanted the Estate's 1/2 undivided share in the shophouse to be transferred to him as the sole beneficiary of the Estate to the exclusion of the Plaintiffs who are also the rightful beneficiaries under the Estate entitled to share in the shophouse.

7. The Plaintiffs say that it is for this reason that the Plaintiffs and the Defendant as the beneficiaries of the Estate could not agree and to this date formal applications for the Letters of Administration of the Estate has not been applied for.

8. Further, the Plaintiffs say that the Defendant since the death of the Deceased has been wrongfully collecting the Estate's shares of the rental from the shophouse for his own use and has refused to give an account and/or pay to the Plaintiffs their rightful shares.

Particulars

...

9. The Plaintiffs say that by the conduct and actions of the Defendant, the Plaintiffs have suffered losses and damages and the Defendant had deprived the Plaintiffs' rights as lawful co-beneficiaries of the said Estate.

10. The Plaintiffs therefore claims against the Defendant as follows:

(a) A declaration that the Plaintiffs and Defendant were and are the rightful issues heirs and beneficiaries of the Estate of the Deceased and are entitled to take in equal shares under the Estate of the Deceased.

(b) A declaration that the Plaintiffs and Defendant as the rightful issues heirs and beneficiaries of the Estate of the Deceased shall be entitled to take and be distributed the property under the Estate of the Deceased in equal shares.

(c) An order for the equal distributions of the Deceased Estate among the Plaintiffs and Defendant and that the Senior Assistant Registrar shall be authorized to sign and execute the Letters of Administration, the Transmission, Memorandum of Transfer and all relevant documents relating thereto.

(d) An account be taken of the rentals received by the Defendant under the Estate.

(e) An order for the payment by the Defendant to the Plaintiffs in equal shares of rentals from the Estate upon the taking of such accounts.

(f) Such further and other relief as this Honourable Court may deem fit and proper to grant.

By a summons in chambers dated 7 May 1999 the defendant prayed for the writ of summons and statement of claim of the plaintiffs be struck out on the grounds that:

(a) it discloses no reasonable cause of action; and

(b) it is an abuse of the process of the court.

(c) Also the plaintiffs' action is premature as no attempt has been made to apply to the Probate Officer, Sibu and that the Administration of Estates Ordinance, Sarawak Amended in 1965 (Cap. 80) does not confer any jurisdiction to the High Court to issue any grant of letters of administration or probate as only the probate officer has the power to decide to whom the grant of letters of administration.

The application is supported by the affidavit of the defendant affirmed on 4 May 1999.

An affidavit of opposition was affirmed by the 2nd plaintiff on 25 May 1999 on behalf of the plaintiffs.

An affidavit in reply was affirmed by the defendant on 7 June 1999.

The learned counsel for the defendant submitted that the application is based on the grounds that (a) there is no reasonable cause of action and (b) that it is an abuse of the process of court. The plaintiffs' action is premature as no attempt has been made to apply to the Probate Officer for the letters of administration. Under the Sarawak Administration of Estates Ordinance (Cap. 80) it does not confer any jurisdiction to the High Court to issue any grant of letters of administration or probate. The Probate Officer is the only person who has power to decide to whom the letters of administration to be granted. In support the cases of *Ong Ka Kim v. Wong Sing Kiong & Ors* [1997] 4 CLJ Supp 440 and *Lim Siok Luan v. Theresa Chin Kim Thye* [1999] 1 AMR 133 were cited.

The learned counsel for the plaintiffs in his written submission contended, *inter alia*, as follows:

(1) The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court (RHC) are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable. *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Berhad* [1993] 4 CLJ 7.

(2) In an application under O. 18 r. 19(1)(a) RHC, the pleadings and particulars alone shall be considered and all the allegations in it shall be presumed to be true, and it is only in that assumption that any suitable case can be made for this application. The court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of

claim discloses some ground of action the mere fact that the plaintiffs is not likely to succeed on it at trial is no ground for it to be struck out. See *Honan Plantations Sdn. Bhd. v. Kerajaan Negeri Johor & Anor* [1998] 3 CLJ 253.

(3) When an application is also made under the other limbs of O. 18 r. 19(1) RHC, the court should embark on a minute examination of the affidavits and documents. See *Raja Zainal Abidin Raja Hj Tachik & Ors v. British American Life & General Insurance Bhd* [1993] 3 CLJ 606 and *Sum Phoon Mun v. Mann Foong Realty Sdn Bhd & Anor* [1998] 3 CLJ 919.

(4) Exhibits "CSE-l", "CSE-2" and "CSE-3" showed that back in 1994 and 1995 the plaintiffs had proposed that the estate be distributed in accordance to the law *ie*, equal shares to all the surviving children. However, the defendant refused. Exhibit "CSE-4" dated 4 December 1997 clearly showed that the defendant wanted the estate ½ share in the shophouse to be transferred to him as the sole beneficiary of the estate to the exclusion of the other rightful beneficiaries.

(5) The exhibits clearly show that the defendant had been and continues to be unreasonable and not agreeable to the proposals of the plaintiffs *ie,* that all the children taken an equal shares under the estate. This is the position under the Distribution Act. However, the defendant disagreed and refused to an equal share. The defendant wants a greater share.

(6) Therefore in order to break the dead lock and for the proper and equitable administration and distribution of the estate, the plaintiffs have no choice but to come to this Honourable Court for their rights and interests to be protected. A dispute and/or controversy has clearly existed between the parties which involve the rights and interests of the parties to and under the estate. This court has the power, jurisdictions and discretion to determine the issues between the parties.

(7) It is clear that the plaintiffs have and the statement of claim discloses a reasonable cause of action which is clearly sustainable and maintainable in this court. Therefore, this is not a plain and obvious case to strike out the plaintiffs' action. On the contrary, the plaintiffs have a good case on the merits.

(8) The plaintiffs are not asking this Honourable Court to issue any grant of Letters of Administration to the plaintiffs under the Administration of Estates Ordinance (Cap. 80). The Administration of Estates Ordinance mainly deals with the application for and grant of probate or letters of administration, *ie*, who shall become the executor or administrator.

Section 17 of the Administration of Estates Ordinance deals with the distribution of the estate.

(9) In this case, the plaintiffs are concerned about the equitable distribution of the estate in accordance to recognised law *ie*, the Distribution Act.

(10) The parties, in particular the plaintiffs, could not apply to the Probate Officer at the Sibu District Office under the Administration of Estates Ordinance because the parties could not agree to the proper and equitable administration and distribution of the estate. Assuming that the plaintiffs and defendant could apply to and be granted the letters of administration, the parties would still have to come to this court to determine their rights to distribution under the estate.

(11) The plaintiffs in paras. 10(a) and (b) of the statement of claim have therefore asked for a declaration that the plaintiffs and the defendant were and are the rightful issues heirs and beneficiaries of the estate of the deceased and are entitled to take in equal shares under the estate and that the plaintiffs and defendant shall be entitled to take and be distributed the property under the estate in equal shares.

(12) A declaratory relief is discretionary in nature and the court is always expected to exercise its judgment as to the reasonability and necessity of granting such a relief. The court may refuse to entertain declaratory proceedings when there is no dispute at all, or where the matter is highly hypothetical or where it involves future rights. See *Goh Joon v. Kerajaan Negeri Johor & Ors* [1999] 5 CLJ 335. In this case, there is clearly a dispute and controversy between the plaintiffs and the defendant, the matter is not hypothetical but involves an existing and proprietary rights and interests of the parties.

(13) Siti Norma Yaakob J (as she then was) in *Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor* [1988] 2 MLJ 604 said that a declaratory judgment does not involve a cause of action in the usual sense and that six factors must be present before there can be a declaratory order. These are:

(a) There must exist a controversy between the parties.

(b) The proceedings must involve a "right".

(c) The proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as "standing" or "*locus standi*".

(d) The controversy must be subject to the court's jurisdiction.

(e) The defendant must be a person having a proper or tangible interest in opposing the plaintiff's claims.

(f) The issue must be ripe, *ie*, it must not be of academic interest, hypothetical or one whose resolution would be of no practical utility.

It is humbly submitted that all six conditions are met by the facts of this case and there is no merits to the defendant's contention that the plaintiffs' claims cannot be maintained.

(14) Section 41 of the Specific Relief Act 1950 allows the plaintiffs to seek declarations as to his legal character or status or right to property, which is the case here.

(15) Order 15 r. 16 RHC provides that the plaintiffs only need to establish that their legal interests have been affected. The plaintiffs do not even have to show any cause of action. In this case the plaintiffs have a standing to come to this court because their rights are at stake.

(16) Apart from the declaratory orders, the plaintiffs are also applying for an account to be taken of the rentals received by the defendant under the estate and for the defendant to pay to the plaintiffs their rightful shares to the rental after the taking of such accounts. These are set out in paras. 10(d) and (e) of the statement of claim. This is a reasonable cause of action in itself and should not be struck out.

(17) Therefore the plaintiffs claims are not premature. Their rights and interests under the estate have been affected and prejudiced by the actions of the defendant. They are entitled under the law to come to this Honourable Court for relief.

I shall deal with the matter before me.

The provisions of the Administration of Estates Ordinance (Cap. 80) do not confer any jurisdiction on the High Court to issue any grant of probate or letters of administration. The person clothed with power to do so is now only the Probate Officer (see *Ong Ka Kim v. Wong Sing Kiong & Ors* [1997] 5 MLJ 46 and *Lim Siok Luan v. Theresa Chin Kim Thye* [1999] 1 AMR 133).

In *Lim Siok Luan v. Theresa Chin Kim Thye* [1999] 1 AMR 133 His Lordship Ian HC Chin J at p. 138 succinctly said:

> The Probate Officer is clothed with power under the Ordinance to decide to whom the grant of probate or letters of administration should be issued to but the exercise of this power can be challenged in a court of law by way of judicial review (*Foo Sam Tek v. Probate Officer, Simanggang* [1960-63] SCR 17) or even by way of a writ action seeking a declaration regarding the correctness of the decision (*Teh Guan Teik (SJN. 7847) v. Inspector-General of Police & Anor.* [1998] 3 AMR 2141 FC.

In our case neither the plaintiffs nor the defendant had made any application to the Probate Officer Sibu for the grant of letters of administration in respect of the estate of the deceased. Thus, no administrator has been granted letters of administration by the Probate Officer Sibu.

Section 17 of the Administration of Estates Ordinance reads as follows:

> 17. On obtaining probate or letters of administration the executor or administrator, as the case may be, shall forthwith –
>
> (a) collect and recover all the property, assets and effects covered by the grant;
>
> (b) discharge thereout all the debts due by the deceased which are legally recoverable; and
>
> (c) distribute the residue of the estate among the beneficiaries or heirs of the deceased, according to the will of the deceased or, as the case may be, in the shares to which they are entitled by recognised law or custom.

Under s. 17(c) of the Administration of Estates Ordinance it is the duty of the administrator to distribute the residue of the estate among the beneficiaries or heirs of the deceased, according to the will of the deceased or, as the case may be, in the shares to which they are entitled by recognised law or custom. So when distributing the estate of the deceased the administrator has to take into consideration the Distribution Act 1958 which is an Act relating to the law of distribution of intestate estates.

In *Lim Siok Luan v. Theresa Chin Kim Thye* [1999] 1 AMR 133 His Lordship Ian HC Chin J at p. 139 said:

> As for the entitlement to a share in the estate, a claim must be put forth and rejected before any action can be commenced based on the rejection. In this regard the alleged conversation denying the rights of the plaintiff and her children to a share in the estate is of no consequence since only the administrator can make such a decision and such administrator had not yet been appointed.

I am in full agreement with His Lordship.

In our case the averment in para. 6 of the statement of claim that "However, the defendant unreasonably and wrongfully wanted the estate's ½ undivided share in the shophouse to be transferred to him as the sole beneficiary of the estate to the exclusion of the plaintiffs who are also the rightful beneficiaries under the estate entitled to share in the shophouse" is of no consequence since only the administrator can make the decision as to the person or persons entitled to the same and such administrator had not been appointed.

Section 29 of the Administration of Estates Ordinance reads as follows:

> 29. An executor or administrator may refer to the court for settlement any question arising in the course of winding up the estate, and the costs thereof shall be borne by the estate, unless the court otherwise directs.

Under the aforesaid section the administrator may refer the dispute averred in para. 6 of the statement of claim to the court.

It is not proper for this court to usurp the power of the administrator by granting a declaration that the plaintiffs and defendant were and are the rightful issues heirs and beneficiaries of the estate of the deceased and are entitled to take in equal shares under the estate of the deceased because it is provided under s. 17 of the Administration of Estates Ordinance that it is the duty of the administrator to decide the person or persons entitled to the share of the estate and in what proportions.

After the administrator has made his decision as to the person or persons entitled to the share of the estate and in what proportions, then if any of the issues, heirs or beneficiaries are dissatisfied with the decision of the administrator they can bring an action against the administrator.

As no administrator has been appointed, I am of the view that this action by the plaintiffs is premature. I am of the view that the statement of claim discloses no reasonable cause of action.

In view of the foregoing, I order that the writ of summons and statement of claim be struck off with costs to the defendant to be taxed unless agreed.